LG&E

**Louisville Gas and Electric Company**
*220 West Main Street*
*P.O. Box 32010*
*Louisville, Kentucky 40232*

March 15, 2001

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PUBLIC SERVICE COMMISSION

Thomas Dorman
Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, KY 40602

**Re: Petitions of Louisville Gas and Electric Company and Kentucky Utilities Company for Confidential Treatment of Certain Information Contained in Coal Supply Contracts; Case Nos. 2000-453 and 2000-454 (consolidated)**

Dear Mr. Dorman:

Enclosed you will find for filing an original and ten (10) copies of the Reply Brief of Louisville Gas and Electric Company and Kentucky Utilities Company in the consolidated cases referenced above.

Please contact me if you have any questions about this filing. A copy of this letter and the enclosed Brief have been mailed this date to the Hon. Elizabeth Blackford, Office of the Attorney General.

Sincerely yours,

Douglas M. Brooks
Senior Counsel Specialist, Regulatory
(502) 627-2557

Enclosures

cc: Hon. Elizabeth Blackford

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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| PETITION OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY FOR CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION CONTAINED IN COAL SUPPLY AND TRANSPORTATION CONTRACTS | ) | CASE NO. 2000-453 |

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# REPLY BRIEF OF LOUISVILLE GAS AND ELECTRIC COMPANY AND KENTUCKY UTILITIES COMPANY

MARCH 15, 2001

## I. INTRODUCTION

The initial brief of Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively, the "Companies") comprehensively reviewed the compelling evidence presented by the Companies in this case as well as the relevant law, and concluded that the sensitive commercial information contained in their coal supply and transportation agreements are entitled to protection from public disclosure under the Open Records Act and 807 KAR 5:001, Section 7. The Attorney General's Brief, in contrast, gave short shrift to the evidence and mischaracterized the law while admitting that its position would cause the Companies' rates to be higher than if the Companies' request in this case for confidential protection was granted.

The Companies have presented testimony in this proceeding that more than meets the burden imposed by KRS 61.878(1)(c)1 to show that the information is confidential and proprietary, and that disclosure would give competitors in several markets in which the Companies compete an unfair advantage. In summary, disclosure increases the prices the Companies pay for coal and transportation, which results in lower margins in the off-system sales market and less attractive rates for existing and prospective retail customers. The Companies have shown that this information is routinely used by coal and transportation suppliers to charge higher prices to the Companies and to the detriment of their customers, which is estimated to cost the Companies and their customers as much as $10 million annually through the application of the Fuel Adjustment Clause mechanism. In so doing the Companies have answered the Commission's criticisms of the evidence presented in Case No. 97-197.

The Attorney General, however, takes issue with the significance of the Companies' evidence and discussion of the relevant law and argues that the Companies have not shown sufficient competitive harm to be entitled to protection from disclosure. In so doing the Attorney General ignores much of the clear and uncontested evidence in the record of this case and misstates both the law and the evidence. In light of the concrete examples of how disclosure harms the Companies' competitive positions, the Attorney General's conclusion that the Companies evidence established no more than a "trivial" competitive harm is disappointing. So is the Attorney General's apparent refusal to recognize the Commission's prior decisions granting confidential protection for such information as the Companies' coal bid tabulation sheets and LG&E's gas supply and transportation agreements.

The Companies have clearly exceeded their burden of proof in this proceeding, and are entitled to have the sensitive commercial information found in their coal supply and transportation agreements protected from public disclosure, just as the Commission has protected in the past similarly commercially sensitive information.

## II. ARGUMENT

### A. The Open Records Act

The Companies and the Attorney General disagree over the meaning of the Supreme Court's decision in Marina Management Services v. Commonwealth of Kentucky, 906 S.W.2d 318 (Ky., 1995) ("Marina"). It is clear from the analysis of the evidence discussed in that opinion that the Supreme Court does not interpret KRS 61.878 (1)(c)1 to require proof of actual harm in order to qualify for protection from disclosure. Nor was the case decided, as the Attorney General suggests, on the grounds that the material in question was originally given to the Cabinet for Tourism on a confidential basis.

The Supreme Court's review in Marina focused on whether the Legislative Program Review and Investigation Committee (LPRIC) could obtain confidential financial statements of a private corporation from the Tourism Cabinet. The Court held that disclosure of the records would unfairly advantage competing operators, most obviously through the ability to ascertain the economic status of the licensee without having to run the hurdles normally associated with acquiring such information about privately owned corporations. 906 S.W.2d at 319. Since the information had been originally filed confidentially, the private company was obviously unable to establish that it had suffered any actual harm, but, like LG&E and KU, made a persuasive presentation concerning the potential competitive harm that it would suffer if public disclosure was not prevented. Thus the Court did not require the identification of any irreparable or immediate injury that it would suffer should the reports be disclosed. Id. at 320.

The Attorney General argues that the Companies have attempted to portray Marina as establishing "some new and lesser standard" (Post Hearing Brief of the Attorney General, p. 3) for what must be shown to qualify for an exemption under KRS 61.878 (1)(c)(1). Nothing could be further from the truth. The Companies discussed Marina in their initial Brief because that case is clearly instructive and demonstrates the proper application of KRS 61.878 (1)(c)(1) to the type of facts presented in the record of this case. It illustrates the Court's analytical process for judging when information is entitled to an exemption from disclosure, and is entirely consistent with the Court's later decision in Southeastern United Medigroup, Inc. v. Hon. John J. Hughes, 952 S.W.2d 195 (1997) ("Southeastern United"). Marina should not be ignored as suggested by the Attorney General.

The Companies agree with the Attorney General that the Court in Southeastern United held that the competitive damage alleged must be more than trivial. The parties also agree that the Southeastern United decision requires a weighing of the various factors, or, as the court put it, the effect of protecting a given document from scrutiny should be "considered in the balance." Id., 199. However, the Companies believe that this case, like the Marina case, is significant because the Court did not rule that the petitioning party must provide concrete examples of where it has been harmed by the release of the confidential information in the past, and the party seeking relief was not required to show an irreparable or immediate injury that would be suffered should the reports be disclosed. Furthermore, as discussed below, the Companies and the Attorney General obviously disagree about what constitutes "trivial" damage.

The Attorney General also argues that that "(i)n this time of high utility prices" (an inaccurate statement with regard to the Companies' electric rates) and because the Fuel Adjustment Clause allows changes in costs to be passed along before the Commission's review, "it is essential that consumers maintain the ability to examine key elements underlying the rates they pay." Post Hearing Brief, p. 5-6. This concern, according to the Attorney General, somehow justifies consumers paying higher electric rates as a result of public disclosure. This argument is plainly erroneous. Any participant in the Companies' FAC review proceedings would be able ton obtain complete access to all of the confidential information and data that the Companies file concerning the fuel and transportation costs they recover through the FAC through signing an appropriate nondisclosure agreement. The Companies and the Attorney General have successfully utilized this discovery procedure in several recent cases. Granting the Companies the relief currently requested in the cases at hand will not interfere with the rights of any party to fully examine all necessary data and documents relevant to the FAC.

**B. The Record in This Case Convincingly Shows That the Competitive Harm Disclosure will Cause is not Trivial.**

The essence of the Attorney General's argument over whether the Companies have met their burden of proof in this case is whether the competitive harm that the Companies will suffer should disclosure occur is "trivial." The Attorney General dismisses the discussion of the negative impact disclosure has already caused by wrongly asserting that Companies witness Heller could not demonstrate a direct competitive harm and that damages that the Companies would suffer in the wholesale market should disclosure occur would be "insidious and difficult to measure." Post Hearing Brief, p. 6. Apparently the Attorney General mistakenly believes that this phrase is synonymous with "trivial." The evidence presented by the Companies shows that the competitive damage that disclosure causes is substantial and on-going.

The Attorney General first argues that Mr. Hewett's testimony regarding damages to the Companies in the retail market is not persuasive. Of course, it is not sufficient to simply attempt to discredit the evidence as presented by stating it is not persuasive. The Attorney General's description of the retail market and its assertion that "(t)here simply is no real retail competition" shows that the Attorney General misunderstood Mr. Hewett's evidence. The Companies acknowledge the obvious but irrelevant point advanced by the Attorney General that retail competition is not legally permitted within the service territories of regulated electric utilities within Kentucky. What the Attorney General ignores is that the Companies are engaged in competition for new and relocating retail load with other electric utilities, and that disclosure of the companies fuel and transportation contracts damages the Companies' ability to compete for new retail load. Hewett Testimony, p. 4. Mr. Hewett testified at the hearing in this case that KU has lost electric load to other energy providers. Transcript of Evidence, December 6, 2000 ("Tr."), p. 109-110; 112-117. He also testified that the price of electricity is an important factor when an industrial concern decides where to locate new industrial load. Tr. p. 121. Further, the Attorney General attempts to address the very real competition between alternative energy types (i.e., gas vs. electric) by merely stating that the nature of gas and electric businesses are so different that disclosure has no impact. The simple fact is that the only item that requires understanding is for a customer to compare prices in terms of their operating costs (monthly bills) to permit the determination of an informed investment decision. It cannot be denied that competition between energy providers for new or relocating retail load exists.

With regard to Mr. Heller's testimony, the Attorney General first argues that evidence concerning the negative impact of disclosure on retail rates presented by Mr. Heller is irrelevant. The Companies suggest that even if the effect of disclosure on retail rates is not a proper consideration under KRS 61.878(1)(c)1, evidence regarding an increase in costs and thus rates is certainly probative of a negative impact of disclosure on the Companies' ability to compete. The Companies are disappointed that the Attorney General, usually a fierce advocate for lower rates, expresses such a sanguine view towards a problem that undeniably increases rates.

The Attorney General next argues that Mr. Heller provided only one "concrete" example of a commercial disadvantage suffered by the Companies. The Commission should realize that the Attorney General uses this argument in an attempt to impose an evidentiary burden upon the Companies that is not required by the statute or either the Marina or Southeastern Medical opinions. Post Hearing Brief, p. 6. Nowhere in either of those decisions does the Supreme Court hold that a party seeking protection from disclosure under KRS 61.878(1)(c)1 must provide a "concrete" example of competitive harm. Regardless of the Attorney General misstatement of the law, the Companies have in fact presented such evidence. The Companies' Brief discussed the examples in Mr. Heller's testimony that showed how competitors and fuel and transportation suppliers have used this type of specific information to gain commercial advantages, and, at other times, how the lack of availability of such specific information has resulted in advantages for the utility.

The most compelling example was explained by Mr. Heller in LG&E/KU Hearing Ex. 1, a copy of which was attached to the Companies' Brief. This Exhibit shows how the knowledge of barge rate differences for different barging points has allowed coal suppliers to increase their coal price from specific origins to offset barge rate differentials and still win contracts with KU. Tr. 99-101. Mr. Heller was able to quantify the impact that disclosure of the barge rate differences had on the ultimate price KU paid for delivered coal under a specific contract as $600,000 on an annual basis. Response to Commission Staff's First Set of Interrogatories, Item 14. He further estimated that if the same type of circumstances applied to all coal purchases of the Companies, customers could experience as much as $10 million in additional fuel costs per year through the FAC. Id. These higher costs obviously disadvantage the Companies in both the retail and wholesale power markets.

Mr. Heller also testified that in his work as a consultant to industry participants, he has been able to use the Companies' fuel and transportation data successfully as part of his presentations to obtain lower coal prices under market price reopeners for clients who compete with KU and LG&E. Heller Testimony, p. 9. Next, he testified that in the negotiation of rail rates with a carrier, a utility attempted to create leverage by shifting its coal purchases to truck. The approach was successful, causing a rail rate reduction of about 30%. However, because the railroad knew the nature of the utility's coal contracts as a result of public disclosure by the utility commission, including duration and minimum volume commitment, the railroad reduced the rail rate only for that portion of the volume which was potentially subject to competition. The captive amounts remained at the higher rate. Id.

In another example he described a utility that was able to obtain a "most-favored-nations" clause in its rail agreement relative to its power generation competitors. This condition was granted upon the condition of confidentiality since the railroad did not want to offer such terms to other companies. Id. Thus the utility was able to benefit from the fact that its rail agreement would not be made publicly available.

In his fourth example involving the re-negotiation of coal supply and transportation agreements, his client was able to obtain a confidential rebate from one of the railroads that was unknown to the competing railroad. The competing railroad actually lowered its rate more than necessary to meet what it perceived to be the competition. In this case the railroad's lack of accurate market pricing information allowed this to occur. Id.

Finally, he testified that on numerous occasions he has provided coal producers with information on "transportation differentials" which are the different rate levels that apply for specific customers from various supply sources. The producers need this information because it helps them refine their bids to meet the competition. The more accurate this information, the less likely that a producer will underbid, that is, leave money on the table relative to the next lowest supplier. He testified that the quality of information available in Kentucky is the best in the country due to the Commission's disclosure rules. Id., p. 9-10.

At this point in its Brief the Attorney General states that Mr. Heller "candidly admitted" that damage suffered by the Companies in the wholesale market as a result of disclosure is "insidious and difficult to measure." Post Hearing Brief, p. 6. The Attorney General later argues that if damage cannot be measured, then it must be trivial. Id., p. 7. The Companies are perplexed that the Attorney General would confuse testimony that damage suffered by the Companies is sinister or dangerous ("insidious") and hard to quantify to mean that such damage is "trivial" or hardly exists. It should be clear to any objective observer of Mr. Heller's testimony that he does not believe that the damage in question was trivial.

Mr. Heller further described how the public disclosure of this information harms the Companies. The harm flows in large part, he emphasized, from the fact that Kentucky is the only state that requires public disclosure of this information, which places KU and LG&E on an unequal footing relative to their competitors. Because delivered fuel costs account for the vast majority of the Companies' variable costs, it is primarily their fuel costs that determine the cost at which they can generate power. The better the quality of information that competitors have about KU and LG&E's fuels contracts, the easier it is for them to understand KU and LG&E's cost structures and then bid in a manner that allows them to capture wholesale power sales that KU or LG&E might have made, or to increase prices of wholesale power sold to the Companies. Conversely, he testified, competitors can negotiate fuel supply agreements with suppliers that are designed to match or improve upon the terms that the suppliers have already given KU and LG&E in the disclosed contracts. With fuel costs being the largest component of variable costs, the Commission releases exactly the type of information that competitors most need to target their bids and win business that might otherwise be won by KU and LG&E. It is unfair for KU and LG&E, he stated, to be disadvantaged relative to their power market competitors in offers to sell power. The result is that the profits from these lost sales that potentially could have been split between customers and shareholders under the Earning Sharing Mechanism instead are taken by competitors. Id., p. 10.

## III. CONCLUSION

The Companies submit that the evidence they have presented in this case meets the standards established by the Kentucky Supreme Court. It is also significant that the testimony is uncontradicted since no testimony has been submitted in this case to the contrary. Mr. Heller's testimony in this case conclusively shows that the damage to the Companies' competitive position is inevitable, as it provides concrete examples of how such sensitive information is used by competitors and against the Companies to the detriment of customers. The Companies have exceeded their burden of proof by quantifying for the Commission the harm disclosure has caused in a single transaction (approximately $600,000) and the potential cumulative impact ($10 million) disclosure could have on the Companies and their customers in one year. In addition, Mr. Hewett has shown that disclosure results in higher retail prices, which damages the Companies' ability compete for new and relocating load. The Commission should therefore grant the relief requested by the Companies, which will allow the Companies to purchase fuel and transportation services at the lowest possible price, thus directly benefiting their customers.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief was mailed this the 15th day of March, 2001 to the Honorable Elizabeth E. Blackford, Assistant Attorney General, Office of Rate Intervention, 1024 Capital Center Drive, Frankfort, KY 40601

Douglas M. Brooks